**ONTARIO ENERGY BOARD**

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule. B, as amended;

**AND IN THE MATTER OF** a generic proceeding commenced by the Ontario Energy Board on its own motion to consider the cost of capital parameters and deemed capital structure to be used to set rates.

**EB-2024-0063**

# WRITTEN SUBMISSIONS OF

# MINOGI CORP.

# AND

# THREE FIRES GROUP INC.

**November 7, 2024**

## A. Introduction

1. We are counsel to Three Fires Group Inc. ("**Three Fires**") and Minogi Corp. ("**Minogi**") in the Ontario Energy Board's (the "**OEB**" or the "**Board**") generic proceeding on cost of capital and other matters (the "**Proceeding**").

2. TFG is an Indigenous business corporation that represents the interests of Chippewas of Kettle and Stony Point First Nation ("**CKSPFN**"). CKSPFN is located in southern Ontario along the shores of Lake Huron, 35 kilometres from Sarnia, Ontario and has 1,000 members who live on-reserve and 900 who live off-reserve.

3. Minogi is an Indigenous business corporation that represents the interests of Mississaugas of Scugog Island First Nation ("**MSIFN**"). The Mississaugas of MSIFN moved into southern Ontario and settled in the areas around Lake Scugog from their former homeland north of Lake Huron around 1700. MSIFN is located on Scugog Island in the Port Perry area and has close to 300 members.

4. Minogi and Three Fires are regular participants in OEB proceedings and related processes, including the Indigenous Working Group that operates with Enbridge Gas.

## B. Overview

5. Minogi and Three Fires have participated in many OEB proceedings, in part with the goal of advancing Indigenous participation in the energy sector and addressing the following unique challenges that Indigenous peoples and business entities face in the development and financing of energy projects. These challenges include most prominently a frequent lack of access to the capital necessary to invest in large, multi-year infrastructure projects, whether entirely or without undue burden, as well as a greater exposure to a project's carrying costs than those faced by many other investors.

6. Minogi and Three Fires' participation and requested relief are based on their proven experience that increasing Indigenous participation is likely to result in three key outcomes:

   (a) it responds to unique Indigenous interests, rights and legal entitlements,

(b) it works toward rectifying the historical exclusion of Indigenous voices at energy decision-making tables, and

(c) it helps Ontario build a more robust energy sector in a way that produces affordability, efficiency, and environmental benefits for all Ontarians.

7. This proceeding has a similar potential to increase Indigenous participation to the benefit of First Nations and Ontario more broadly. Minogi and Three Fires strongly advocate that the Board include a framework that increases the ability of First Nations to participate from the earliest stages of project development and thereby increase opportunities to share the economic benefits of infrastructure projects and influence project decisions as equity participants. It also will result in stronger projects through the perspectives, experiences, community support, and related efficiency gains that effective First Nation participation entails.

8. These issues and the challenges that First Nations face take on increasing importance now, given the large volume of infrastructure projects that are already being undertaken as part of the energy transition. First Nations seek to play a larger role from the standpoint of equity participation, not just in the transmission and generation projects of today, but also in the growing number of renewable, storage, and large-scale infrastructure opportunities that will be financed, constructed, and implemented in the years ahead.

9. For these reasons, the central focus of Minogi and Three Fires in these submissions is on the question of how the Board's cost of capital methodology can support meaningful Indigenous participation and related efficiency gains in Ontario's energy sector.

10. The submissions are organized as follows:

(a) TFG and Minogi have demonstrated that the Board's previous proceedings relating to the cost of capital have failed to account for the rights and entitlements of Indigenous people.

(b) The current proceeding runs a high risk of repeating these errors and omissions of the past, most notably due to the silence of the four expert reports in this proceeding (the

"**Four Expert Reports**")[1] on issues relating to Indigenous participation, Indigenous interests, or the impact of the matters at issue in this proceeding on Indigenous peoples.

(c) At least two of the Four Expert Reports expressly adopt a bias in favour of the status quo. Given the failure of the 2009 Decision to examine Indigenous interests and the historical exclusion of those interests, a status quo bias represents an arbitrarily higher standard for First Nations on issues of concern to them, especially given the failure of the Four Expert Reports to examine how the interests of Indigenous peoples might provide reasons to adapt current approaches to the determination of the cost of capital.

(d) The current omissions and biases are inconsistent with Canada's and Ontario's rapidly advancing recognition that supporting Indigenous economic opportunity is an integral aspect of economic reconciliation, an expanding legal requirement, an integral aspect of the public interest, and an essential component of Ontario's ability to navigate the energy transition successfully. This is supported by a review of the relevant policy documents, jurisprudence, and regulatory decisions.

11. There are: (i) obstacles that currently inhibit more meaningful Indigenous engagement and equity participation in Ontario's energy sector, and (ii) specific measures available to the Board in the context of this proceeding to mitigate these problems, while also promoting the broader objectives of economic reconciliation and the Board's mandated priorities.

12. These submissions specifically address:

(a) *Issue 13*: Minogi and Three Fires request that the Board provide a risk premium for single-asset transmitters in cases of Indigenous equity participation that satisfies a reasonable materiality threshold, reflecting the fact that the capital treatment for single-asset transmitters should reflect the higher levels of risk involved.

This is supported by the increasing rates of Indigenous participation in these vehicles and the fact that many were designed with the intention of facilitating Indigenous investment, such that

[1] The Four Expert Reports are the reports from London Economics International, Concentric Energy Advisors, Nexus Economics, and Dr. Sean Cleary.

insufficiently high returns can disproportionately impact Indigenous investors and undermine the original design goal of facilitating Indigenous equity participation.

(b) *Issue 20/21*: Minogi and Three Fires request that the Board adopt a Weighted Average Cost of Capital ("**WACC**") applicable to Construction Work in Progress ("**CWIP**") balances for large, multi-year[2] projects and investments. This approach better reflects the full participation costs for investors, particularly Indigenous investors who typically do not have access to large pools of capital and must borrow the funds necessary to participate in large infrastructure projects. This adjustment would mitigate a significant barrier to increasing Indigenous equity participation in Ontario's energy sector.

(c) *Issue 20/21*: Minogi and Three Fires also request that the Board confirm the ability for Indigenous equity participants to access accelerated cost recovery mechanisms to recover costs for CWIP in advance of a project's in-service date for large, multi-year projects and investments.

In particular, Minogi and Three Fires request that the Board confirm:

(i) the availability of CCR in large, multi-year[3] projects, subject to application to the Board in the specific circumstances of the case; and

(ii) that CCR will be made available in circumstances where doing so will mitigate obstacles to investment involving cost for an Indigenous applicant.

This finding will help mitigate the cost barrier that Indigenous investors often face by reducing carrying costs over what can be many years. It is also consistent with previous findings of the Board, which expressly anticipate the availability of such mechanisms on application and in appropriate circumstances.

13. The OEB is one of the only entities that can enable Indigenous ownership in energy projects across Ontario, as well as ensure that Indigenous voices are at the table on the central policy and project-development questions that the energy sector faces.

14. Accordingly, as these submissions demonstrate, the Board's active engagement on these issues are a core part of its mandate, consistent with the Board's legislated priorities and

[2] I.e., greater than one year.
[3] I.e., greater than one year.

applicable jurisprudence. The Board's engagement on these issues is also a prerequisite towards seizing on the opportunities of Ontario's energy future as well as the promise of reconciliation.

## SUBMISSIONS

### C. Previous Proceedings and the Four Expert Reports Fail to Account for the Rights and Entitlements of Indigenous Peoples

15. It is perhaps an obvious point that significant challenges exist towards the realization of an energy sector in Ontario that includes meaningful Indigenous participation, as well as a sector where Indigenous interests in general are both meaningfully considered and advanced.

16. Part of the challenge that Ontario's energy sector currently faces is a pre-existing foundation that has too often failed to consider the specific interests of Indigenous peoples or facilitate their meaningful participation. Indigenous perspectives have often been absent from the deliberations and decisions that define Ontario's economy and energy sector, and consideration of the impact of such decisions have on Indigenous peoples has very often similarly been missing.

*The 2009 Decision and Its Subsequent Review Failed to Consider Indigenous Rights and Interests*

17. For the purposes of this Proceeding, the Board's most recent comprehensive engagement on issues relating to cost of capital represents an important example of a failure to engage with matters of specific importance to Indigenous Peoples.

18. In particular, the Board's 2009 cost of capital decision (the "**2009 Decision**"), as well as its related 2016 Staff report (the "**2016 Review**"), both contain no reference to Indigenous peoples, nor do they contain any express consideration of the interests, rights or entitlements of Indigenous peoples. In other words, neither the 2009 Decision nor the 2016

Review address how any of the cost of capital issues examined would either help or hinder the integration of First Nations or Indigenous peoples into the energy sector.[4]

*Failure of Experts to Address the Considerations of Indigenous People Replicates Past Mistakes*

19. Minogi and Three Fires respectfully submit that the current proceeding faces a significant risk of repeating these omissions, thereby carrying forward a cost of capital structure that fails to consider the rights and entitlements of Indigenous peoples, or otherwise advance reconciliation in any meaningful way.

20. The most troubling warning sign is the absence from each of the Four Expert Reports of any discussion of the rights, entitlements, or distinct circumstances of Indigenous people living in Ontario. In other words, the Four Expert Reports did not include any discussion of the specific impact of the cost of capital questions at issue in this proceeding on or their implications for Indigenous peoples.

21. The submissions of Caldwell First Nation and Mississaugas of the Credit First Nation cover this significant omission in detail at paragraphs 9-21 of their submissions. Minogi and Three Fires have reviewed those paragraphs and adopt them for the purposes of these submissions. They will therefore rely on those submissions and not repeat the details concerning the various ways in which the experts acknowledge that their reports did not consider the interests of Indigenous peoples or the potential impact of this proceeding on them.

*Two Experts Exacerbate Their Omission of Indigenous People with an Express Status Quo Bias*

22. The concerns that Indigenous interests will either not form part of the Board's central consideration, or that they will be treated with secondary importance, are underscored and exacerbated by the risk of a status quo bias, which two of the experts in this proceeding expressly adopt.

23. London Economics ("**LEI**") is one of the experts to adopt a status quo bias. Their report (the "**LEI Report**") includes a section entitled "Principles and approach",[5] in which LEI reviews cost of capital principles, regulatory accounting principles, and the OEB's mission and

[4] EB-2009-0084, "Report of the Board on the Cost of Capital for Ontario's Regulated Utilities" (the "**2009 Decision**") and "OEB Staff Report: Review of the Cost of Capital for Ontario's Regulated Utilities" (the "**2016 Review**").
[5] LEI Report, page 38-41.

mandate towards the formulation of five principles that LEI employs to "evaluate its potential alternatives and arrive at its recommended approach."[6]

24. LEI's third guiding principle expressly sets out the report's status quo bias. The principle states:

> "***Transitioning away from the status quo only if the associated benefits are material*** as there is limited merit in modifying aspects of the methodology that have worked well"[7] (Emphasis in original.)

25. Under cross-examination, despite his report's clear wording to the contrary, Mr. Goulding, on behalf of LEI, disagreed that the principle represented a status quo position. He nevertheless conceded that the LEI only recommended changes where there was evidence providing a strong justification for doing so.[8]

26. Mr. Goulding also clarified that, in LEI's view, the benefit of any change should be balanced against the costs of changes to the status quo:

> Mr. Daube: So is it fair to characterize that as a default status quo position?
>
> Mr. Goulding: I don't love that characterization because that suggests that we simply closed our eyes and, wherever possible, went with the status quo, and that was certainly not our objective.
>
> What we want to do is to balance the potential benefits from a change against overall costs, whether they are administrative burdens, whether they are perception of the industry, provided of course we are meeting the statutory requirements.
>
> So I wouldn't describe it as a default. I would describe it as: Let's make sure that we take into account consideration of administrative burden, of the idea that investors value consistency over time, all of these various factors, right, balanced against what are the benefits of the change….[9]
>
> (Emphasis added.)

27. Mr. Goulding confirmed that references in LEI Report to the status quo should be understood in large part to mean the 2009 Report:

> Mr. Daube: And fair to say that when you are referencing status quo policy in your report, that often means in large part the 2009 cost of capital report and the policies that flow therefrom?
>
> Mr. Goulding: Yes, I think that's correct. I mean, it does mean things that have happened afterwards as well. But, generally, I think that's a fair statement.[10]

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[6] LEI Report, page 40.
[7] LEI Report, page 41.
[8] Transcript Volume 1, page 144-145.
[9] Transcript Volume 1, page 145.
[10] Transcript Volume 1, pages 153-154.

28. LEI's approach, however Mr. Goulding chooses to label it, creates a condition that is impossible to satisfy when it comes to giving weight to matters of specific concern to First Nations. By failing to investigate, reference, or otherwise consider the impact of the questions in this Proceeding on the interests of Indigenous peoples, the LEI Report loses all ability to consider those interests as potential grounds to alter the status quo.

29. Dr. Cleary in his report (the "**Cleary Report**"), referencing the LEI Report, adopts the same "status quo" language as the LEI Report, set out in paragraph 23 above. Under cross-examination, however, he sought to clarify that any status quo orientation should not apply to, among other things, questions of how to facilitate Indigenous equity participation in the energy sector:

> Dr. Cleary: … [W]hat I was talking about was the basic methodologies for the short-term debt rate and the long-term debt rate and the OEB formula and, you know, reporting requirements and so on and so forth. I don't want to say that I meant that that that (sic) was with respect to the methodologies, I don't want that to be interpreted that I thought we should not plan for transitions, energy transitions for example, or transition in the way operations are handled. Does that make sense?
>
> Mr. Daube: I think so. It wouldn't apply, for example, to the question of how to facilitate Indigenous equity participation, because you didn't consider that; right?
>
> Dr. Cleary: Correct. I think that is an issue that is an important one that the status quo needs to be improved upon, for example. Although I haven't – I don't have recommendations as to how to do so, other than to pay more attention to it, consult the groups and see how that can be beneficial to both sides.[11]

30. The triple combination of the absence of any specific consideration of Indigenous interests from the underlying 2009 Decision and its resulting framework, plus the identical omission from the Four Expert Reports, plus a general orientation towards, if not bias in favour of, the status quo is deeply problematic from the perspective of the First Nations participating in this Proceeding.

31. In particular, whether the result of oversight or omission, the Four Expert Reports elevate the risk that Indigenous interests will once again be overlooked, treated as secondary, or otherwise deferred to a separate proceeding once this proceeding's central decisions have already been taken.

[11] Transcript Volume 5, page 201.

32. Any of these outcomes would be increasingly inconsistent with the current state of reconciliation, legal entitlement, and broader energy sector policy, as the sections below will demonstrate.

*At Least Two Experts Implicitly Recognize a Gap, But Propose Partial and Inadequate Solutions*

33. As the sections below will detail, this proceeding takes place in the broader context of Canada's increasing recognition of the rights of Indigenous peoples and the imperatives of reconciliation, including a growing emphasis on economic issues. Each of these factors contribute to a sharply different context for this Proceeding as compared with the context of the predecessor proceeding in 2009.

34. In some ways, the experts in this Proceeding accept that these changes have taken and continue to take place. There was general agreement among the experts who were asked through interrogatories and under cross-examination on the importance of considering cost-of-capital and equity-participation issues relevant to Indigenous Peoples, even if that analysis is absent from their reports.[12]

35. Notwithstanding this acknowledgment, three of the experts took the position that the specific consideration of Indigenous interests should take place as part of a separate proceeding or was otherwise beyond the scope of the current proceeding.

36. Concentric Energy Advisors' ("**Concentric**") view, for example, is that the question of incentives to support Indigenous or First Nation equity participation is outside the scope of the current proceeding.[13]

37. Mr. Goulding, on behalf of LEI, expressed a similar view during his cross-examination and in responses to interrogatories,[14] recommending that reconciliation should be addressed holistically in a separate proceeding. He stated the following under cross-examination:

> … I think First Nations issues are critically important, and I believe that the regulatory structure is evolving. I think that the development of First Nations regulatory bodies is important and I think that the participation of First Nations across regulatory proceedings is critical.
>
> Now, what I am cognizant of, however, is that this is a generic proceeding, and I'm trying to think about this from the standpoint of rate-making principles and rate design. And so, what I am trying to do is be fair to ratepayers and investors.

[12] See Transcript Volume 1, pages 147-148, as well as specific references noted in this section of the submissions.
[13] See Transcript Volume 2, pages 104-105; N-M2-1-TFG/Minogi-3, Responses D and H.
[14] N-M1-12-TFG/Minogi-1, Response B. See also Transcript Volume 1, page 150-151.

> …
>
> [M]y view is that the issue of reconciliation in this space would best be dealt with holistically in a separate proceeding than in a generic cost of capital proceeding.[15]

38. Mr. Goulding provided a similar defence of the 2009 Decision and the 2016 Review, reiterating the importance of addressing reconciliation but rejecting that doing so should form part of a generic proceeding:

> Mr. Daube: Do you agree, subject to check if you would like, that there are no direct references in this report to First Nations, Indigenous or Aboriginal Peoples.
>
> Mr. Goulding: Yes. Subject to check, but yes.
>
> Mr. Daube: And the same goes for the 2016 review produced by OEB Staff?
>
> Mr. Goulding: Subject to check, yes.
>
> Mr. Daube: And so far as you're aware, there is no discussion of how any of the cost of capital issues examined will either help or hinder the integration of First Nations or Indigenous Peoples into the energy sector, so far as you are aware?
>
> Mr. Goulding: So far as I am aware, but we can't have – we can't solve all public policy problems through a generic cost of capital proceeding. Right? They are extremely important matters that absolutely need to be addressed, but we can't address them all in a generic proceeding.[16]

39. Dr. Cleary acknowledged that it was "unfortunate" that given the scope of the proceeding cost of capital implications for First Nations were not considered.[17] Nevertheless, he ultimately adopted a position similar to Mr. Goulding and recommended a separate proceeding to address cost of capital issues such as a lack of Indigenous access to sufficient capital in certain instances.[18]

40. Minogi and Three Fires wish to acknowledge Mr. Goulding's and Dr. Cleary's good faith efforts to advance economic reconciliation by recommending a separate hearing presumably aimed at that objective, but their proposal would perpetuate historical omissions and mistakes by once again separating Indigenous considerations from the central conversations where the most significant decisions will be made, treating them as secondary and irrelevant to those central decisions.

41. As detailed in the sections immediately below, the proposal for a separate hearing is also directly at odds with the current state of reconciliation, Indigenous legal entitlements, and

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[15] Transcript Volume 1, pages 147-148.
[16] Transcript Volume 1, page 154.
[17] Transcript Volume 6, pages 19-20: "And then it is unfortunate that, given the scope of it, that the whole everything wasn't included, but I think it would be a good starting point to jump into it."
[18] Transcript Volume 6, pages 17, 19-21.

energy sector policy, all of which make clear that consideration of Indigenous interests, rights and entitlement must form an integral part of decision-making on matters such as the issues in this Proceeding from the outset.

## D. The Applicable Policy and Legislative Context Sets a Much Higher Standard for Facilitating Meaningful Indigenous Participation in the Energy Sector

42. The current state of reconciliation, applicable policy development, and legislation all stand in sharp contrast to the collective silence of the Four Expert Reports, along with the 2009 Decision, concerning the rights and interests of Indigenous Peoples.

43. These sources increasingly recognize the requirement to consider Indigenous interests as an essential component to decision-making, as well as the measures necessary towards ensuring that First Nations may effectively participate in such decisions and the economic activities arising from them.

*EETP Report Calls for Meaningful Indigenous Participation as an Essential Aspect of Ontario's Successful Energy Transition*

44. Ontario's energy sector has begun to reflect these positive trends. The most significant recent example is the December 2023 report from Ontario's Electrification and Energy Transition Panel (the "**EETP Report**").

45. The EETP was established as part of Ontario's strategic preparation for the coming electrification and energy transition:

> The Government of Ontario established the Electrification and Energy Transition Panel to advise government on opportunities for the energy sector to help Ontario's economy prepare for electrification and the energy transition, and to identify strategic opportunities and planning reforms to support emerging electricity and fuels planning needs.[19]

46. It devotes considerable space to Indigenous interests, recognizing that the current moment offers significant opportunities to advance economic reconciliation:

> Importantly, there is broad optimism that the transition to a clean energy economy provides rich opportunities for economic reconciliation with Indigenous communities. Meaningful collaboration on projects to expand infrastructure, enhance the grid and deliver reliable and

[19] EETP Report, page 7 (Exhibit K6.1: TFG Supplementary Compendium for Panel 4, page 89). See also Transcript Volume 6, page 13.

> affordable energy can create opportunities for investment in Indigenous-led ventures, provide revenue, build capacity and create jobs. Ontario's energy sector is committed to moving forward to a clean energy economy on the basis of mutual benefit and maximizing prosperity with Indigenous partners.[20]

47. The EETP is also clear, however, that facilitating the meaningful inclusion of Indigenous communities is a prerequisite for Ontario's successful energy transition, not just an opportunity for the communities themselves:

> The energy transition in Ontario provides an opportunity for meaningful and coordinated inclusion of Indigenous communities at the beginning of what is likely to be an incredible transformation for generations. **It is also the only way that Ontario will be successful in building a clean energy economy**.[21] (Emphasis added.)

48. The necessity of the meaningful integration of Indigenous people into Ontario's energy transition is important enough that the authors repeatedly state the prerequisite in various forms throughout the report. For example, its "key principles and next steps" characterize partnerships as essential to the pace and scale of infrastructure investment that Ontario will need:

> Building meaningful partnerships with Indigenous communities that advance reconciliation and provide Indigenous opportunities in electrification and energy transition. **Partnerships are the only way Ontario will be successful in making energy infrastructure investments at the pace and scale necessary to build a clean energy economy**.[22] (Emphasis added.)

49. The EETP Report is clear in its position that Indigenous inclusion and partnerships must go beyond more limited historical engagement approaches to include increased involvement in investment decisions and equity participation:

> It is not enough to engage with Indigenous communities to advance true partnerships and economic success. Indigenous perspectives in major project benefits and risk assessments, Indigenous-led investment decisions, and Indigenous-held equity stakes are becoming increasingly common.[23]

50. The EETP Report makes clear that any delays in the facilitation of Indigenous participation will negatively impact Ontario's energy future.[24] Accordingly, the EETP Report asserts that Indigenous participation and partnerships must take place at the earliest stages of Ontario's energy transition:

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[20] EETP Report, page 125 (TFG Supplementary Compendium for Panel 4, page 207).
[21] EETP Report, page 33 (TFG Supplementary Compendium for Panel 4, page 115).
[22] EETP Report, page 7-8 (TFG Supplementary Compendium for Panel 4, page 89-90). See also EETP Report, pages 30 and 102-103. See also Transcript Volume 6, page 13-14.
[23] EETP Report, page 52 (TFG Supplementary Compendium for Panel 4, page 134). See also Transcript Volume 6, page 15.
[24] See Transcript Volume 6, page 17-18; EETP Report, page 51 (TFG Supplementary Compendium for Panel 4, page 133).

> **A successful future Ontario will foster meaningful Indigenous participation and partnerships in clean energy projects**, including both energy infrastructure and energy efficiency, conservation and demand management initiatives. **It will include Indigenous perspectives, participation and collaboration at the earliest stages of energy planning at the community, regional and provincial levels, and in the governance of key energy entities**. It will build durable capacity in Indigenous communities, including stable capacity funding to support meaningful and ongoing Indigenous engagement, consultation, participation and partnerships.
>
> Most of the proposed solutions for achieving a clean energy economy rely on using Indigenous lands and resources to build clean and renewable energy infrastructure and extraction projects. **The energy transition in Ontario provides an unparalleled opportunity for meaningful inclusion and collaboration with Indigenous communities from the beginning of what is likely to be an incredible transformation with generational effects**.[25] (Emphasis added.)

51. The EETP Report also recognizes that a lack of access to capital, as well as systemic barriers that have contributed to that lack of access, presents a key obstacle towards Indigenous economic participation in the energy sector:

> Through federal policy such as the Indian Act, Indigenous communities often do not have reasonable and competitive access to capital for investment and economic development. Systemic barriers like the Indian Act have prevented Indigenous businesses from raising capital, and in combination with many Indigenous communities' remote geographic location and fewer human and financial resources, have placed Indigenous communities at a significant competitive disadvantage.[26]

52. As a result, the EETP Report asserts that government and the energy sector must each take active steps towards supporting and financing Indigenous equity participation and project ownership:

> In addition to considering how equity partnership models can support participation and produce broader socio-economic benefits, government and the sector should develop a clear plan, informed by engagement with Indigenous communities, on how organizations/entities will support and finance Indigenous equity participation and project ownership on an ongoing basis.[27]

53. The EETP Report's conclusion that government should advance economic reconciliation, potentially in part by conducting a review of applicable energy agency frameworks towards

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[25] EETP Report, page 25 (TFG Supplementary Compendium for Panel 4, page 107). See also LEI Cross-Examination, Transcript Volume 1, page 154.
[26] EETP Report, page 53 (TFG Supplementary Compendium for Panel 4, page 135). See also Transcript Volume 5, page 204-5; See also EETP Report at page 37 (TFG Supplementary Compendium for Panel 4, page 119): "In short, First Nation, Inuit, and Métis communities do not always have access to sufficient funding to support consultation or their economic participation in projects that affect or appeal to them."
[27] EETP Report, page 45 (TFG Supplementary Compendium for Panel 4, page 117).

facilitating Indigenous equity participation, forms the basis for the EETP's Recommendation 20:

> The government should advance economic reconciliation through flexible financing models and mechanisms that incentivize Indigenous project ownership across small, medium, and large-scale energy projects. This could include:
>
> …
>
> d. Review of current energy agency frameworks, including regulatory and procurement policies, to identify opportunities to improve flexibility and enhance Indigenous project ownership.[28]

54. The Four Expert Reports' silence on Indigenous considerations leaves them unresponsive to the EETP Report or its recommendations to promote of Indigenous participation in the energy sector, which the EETP Report identifies as essential to a successful energy transition for Ontario.

*Ontario Government Has Also Emphasized the Goals of Economic Reconciliation in Recent Announcements*

55. Recent policy announcements from the Ontario Government similarly endorse an early, active and meaningful role for Indigenous peoples in Ontario's energy transition, including with respect to equity participation.

56. For example, the Ontario Government's recent document, "Ontario's Affordable Energy Future: The Pressing Case for More Power" ("**OAEF**"),[29] includes a number of positions intended to advance Indigenous participation in Ontario's energy sector.

57. The OEAF anticipates the 111 TWh of additional energy that Ontario will require by 2050 and sets out its purpose in Minister Lecce's foreword as follows:

> This document … provides a full accounting of the challenges facing Ontario's energy system as we work with workers, regulators, sector stakeholders, builders, businesses, Indigenous communities and union partners to confront them. In doing so, this document also affirms our government's commitment to energy policies that keep energy rates down while supporting more jobs with bigger paycheques.

[28] EETP Report, pages 59-60 (TFG Supplementary Compendium for Panel 4, page 141-142).
[29] "Ontario's Affordable Energy Future: The Pressing Case for More Power", published October 22, 2024, updated November 4, 2024, located at https://www.ontario.ca/page/ontarios-affordable-energy-future-pressing-case-more-power.

58. The OAEF identifies a central challenge in the need "to plan for electricity, natural gas and other fuels to ensure that the province's energy needs are anticipated and met in a coordinated way."

59. Similar to the EETP, the OAEF views Indigenous leadership and participation in equity projects as necessary to meet that challenge, as well as planning and regulatory frameworks that support those objectives:

> This is a complex undertaking that will require a comprehensive view of how all energy sources are used across the economy. The pace of change has accelerated, and this is likely to continue as Ontario becomes home to new technologies and growing industries. Ontario must also plan for localized needs in certain communities and regions, changing the way power must flow across the province.
>
> To meet this challenge, Ontario needs planning and regulatory frameworks that support building infrastructure and resources quickly and cost-effectively, and in a way that continues to promote Indigenous leadership and participation in energy projects. There is also a need to accelerate processes for building out the last mile to connect new homes and businesses supported by growth-oriented energy agencies to keep Ontario open for business.
>
> (Emphasis added.)

60. Perhaps even more significantly for the purposes of the current proceeding, the OAEF expressly recognizes the need to advance reconciliation, in part by creating opportunities for economic participation:

> Ontario's energy procurements must continue to advance economic reconciliation with Indigenous communities by including opportunities for Indigenous leadership and participation in generation projects, supported by community capacity funding and access to financing.
>
> …
>
> New transmission infrastructure development needs to continue to advance reconciliation with Indigenous communities through early engagement and by creating opportunities for Indigenous leadership and partnership, economic participation and capacity building.

61. Finally, the OAEF notes the following priorities for Indigenous leadership and participation, highlighting the need for early and meaningful engagement on the key issues that the energy sector faces:

(a) Early and meaningful engagement and consultation with Indigenous communities on energy planning and major energy projects is critical to building out our energy system.

(b) Continued capacity funding and support for Indigenous ownership and participation in energy projects is needed, through programs like the provincial Aboriginal Loan Guarantee Program and the recently expanded IESO Indigenous Energy Support Program.

(c) Energy procurements need to incorporate the value of Indigenous leadership and participation by building on existing incentives and engagement requirements.

(d) Ontario must continue to build meaningful relationships with Indigenous communities and organizations and seek regular dialogue on regional and territorial energy interests underpinned by capacity support and relationship agreements.

62. In short, the OEAF provides another example where the Four Expert Reports fail to reflect the increasingly widespread recognition on the need to place Indigenous interests and economic participation alongside other key imperatives of Ontario's energy sector.

63. Just as the Four Expert Reports were inconsistent with the priorities and recommendations of the EETP, the Four Expert Reports' silence on Indigenous considerations leaves them out of step with the Ontario Government's calls to advance reconciliation, including economic partnerships, as a necessary part of Ontario's energy future.

*Canada's Sustainable Finance Action Council Similarly Promotes Economic Reconciliation as Essential Aspect of Net-Zero Transition*

64. The recent recommendations from the federal government's Sustainable Finance Action Council ("**SFAC**"), which have been generally endorsed by the Government of Canada,[30] similarly promote economic reconciliation as an essential aspect of Canada's net-zero transition.

65. The SFAC's mandate was to provide recommendations to Canada's Deputy Prime Minister and Minister of Finance, as well as Canada's Minister of Environment and Climate Change,

[30] See https://www.canada.ca/en/department-finance/news/2024/10/government-advances-made-in-canada-sustainable-investment-guidelines-to-accelerate-progress-to-net-zero-emissions-by-2050.html.

on defining green and transition investment.[31] Dr. Cleary confirmed that the SFAC was composed of a set of very high profile and knowledgeable individuals.[32]

66. The SFAC recommends a taxonomy ("**Taxonomy**"), which, among other things, is meant to promote the integrity of Canada's net-zero transition by mobilizing the massive amounts of capital necessary to support Canada's transition pathways and climate objectives, including in the energy sector.[33]

67. The report therefore represents SFAC's attempt to define the key guiding principles for how that capital should be directed and allocated in a way that maximizes the likelihood of a successful energy transition or climate transition more broadly.[34]

68. The Taxonomy prioritizes economic rights and reconciliation, establishing adherence to those goals as an essential aspect of any green or transition activity under its "Do No Significant Harm" Principle. The principle states that criteria should be set to screen out green and transition activities if they do significant harm to other environmental, social and governance ("**ESG**") objectives, such as Indigenous reconciliation.[35] The Taxonomy is clear that "if a project violates any one of these criteria, it would be ineligible under the taxonomy."[36]

69. The Taxonomy elaborates that eligible activities must comply with the UN Declaration on the Rights of Indigenous Peoples ("**UNDRIP**") and pose no harm to Indigenous equity participation:

> "No significant harm to Indigenous rights", which means that the "Activity demonstrates adherence to the UN Declaration on the Rights of Indigenous Peoples"; and
>
> "No significant harm to workers or just transition", which the report explains addresses unintended consequences to labour market transitions, including to Indigenous equity participation.[37]

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[31] Taxonomy Roadmap Report, page 1 (TFG Supplementary Compendium for Panel 4, page 5); Transcript Volume 6, page 8-9.
[32] Transcript Volume 6, page 9.
[33] Dr. Cleary confirmed that the trillions of dollars necessary to facilitate Canada's sustainable transition will include significant investments in the energy sector. See Transcript Volume 6, pages 2-3; ISF Report, "Changing Gears", page 2 (TFG Supplementary Compendium for Panel 4, page 226).
[34] Transcript Volume 6, pages 8-10; Taxonomy, page 2 (TFG Supplementary Compendium for Panel 4, page 6)
[35] Taxonomy, page 26 (TFG Supplementary Compendium for Panel 4, page 30).
[36] Taxonomy, page 45 (TFG Supplementary Compendium for Panel 4, page 49).
[37] Taxonomy, page 46 (TFG Supplementary Compendium for Panel 4, page 50).

70. The Taxonomy confirms that the basis for the "Do No Significant Harm" Principle is as follows: "The objective is to prevent myopic investment processes where the objective of climate mitigation is advanced without regard for other important objectives."[38]

71. On cross-examination, Dr. Cleary agreed that the Taxonomy's requirements relating to Indigenous rights and economic reconciliation are representative of elements that increasingly form an important part of the overall consideration of how to maximize the effectiveness of sustainable capital.[39]

72. The Taxonomy stands in sharp contrast with the Four Expert Reports on each of these points. Where the Taxonomy requires active consideration of the impact of an investment on economic reconciliation including Indigenous equity participation as a central consideration in how massive amounts of capital should flow, the Four Expert reports exclude any such consideration from their analysis.

*Dr. Cleary's Cross-Examination Is Consistent with the EETP Report and the SFAC Taxonomy on the Subject of Economic Reconciliation*

73. In the broader context of the silence of the four reports on the topics of economic reconciliation or how the issues under consideration in these proceedings will impact First Nations, the only significant expert testimony on the subject of economic reconciliation came from Dr. Cleary under cross-examination.

74. Dr. Cleary's evidence was entirely consistent with the positions advanced by the EETP Report and the Taxonomy, as detailed in the sections above.

75. For example, Dr. Cleary agreed that the following provides an acceptable definition of economic reconciliation: "It is the inclusion of Indigenous people, communities, and business in all aspects of economic activity, or simply "Economic Reconciliation".[40]

76. Dr. Cleary also agreed that:

[38] Taxonomy, page 26 (TFG Supplementary Compendium for Panel 4, page 30).
[39] Transcript Volume 6, pages 11-12.
[40] Transcript Volume 5, page 204; Exhibit K5.9, Three Fires Group/Minogi Compendium for Panel 4, page 16.

(a) Indigenous communities continue to face multiple barriers to fully participating in the economy, including a lack of access to capital;[41]

(b) Indigenous populations face deeply rooted systemic barriers embedded in the Canadian economic landscape, including systemic exclusion of Indigenous peoples from economic systems; [42]

(c) Industry is starting to realize that advancing economic reconciliation in project development leads to better project outcomes; [43]

(d) Delaying consideration of the questions necessary to advance economic reconciliation would undermine Ontario's ability to seize upon the advantages of meaningful Indigenous participation, including but not limited to in the context of the energy transition and the massive building and investment that the transition is expected to bring;[44] and

(e) Indigenous inclusion and partnerships must go beyond more limited historical engagement approaches to include increased involvement in investment decisions and equity participation.[45]

77. Dr. Cleary also agreed with a series of propositions that set out some of the negative consequences that are more likely to arise if economic reconciliation is not adequately advanced.

78. For example, Dr. Cleary agreed with the following statement from the EETP Report:

> Given that all these projects will be built on Indigenous lands, any opposition or delay to proposed projects will significantly impact the province's ability to seize the economic opportunities of electrification and the energy transition.[46]

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[41] Transcript Volume 5, page 204-205; Indigenous Economic Reconciliation", page 3 (TFG/Minogi Compendium for Panel 4, page 16).
[42] Transcript Volume 5, page 206; "Indigenous Economic Reconciliation", page 3 (TFG/Minogi Compendium for Panel 4, page 16).
[43] Transcript Volume 5, page 205; "Indigenous Economic Reconciliation", page 3 (TFG/Minogi Compendium for Panel 4, page 16).
[44] Transcript Volume 6, page 19.
[45] Transcript Volume 6, page 15.
[46] Transcript Volume 6, page 17-18; EETP Report, pages 51 (TFG Supplementary Compendium for Panel 4, page 133).

79. He similarly agreed failure to engage can produce overruns and delays:

> Mr. Daube: And so would you agree, extending this principle, that a general failure to properly facilitate Indigenous equity participation could present the same sorts of risks that are mentioned here in terms of potential overruns and delays if Indigenous communities are not engaged?
>
> Dr. Cleary: Yes, I do.[47]

80. These types of risks can have a detrimental impact on the cost of raising capital, as Dr. Cleary confirmed.[48]

81. More generally, Dr. Cleary agreed with the following statement, taken from a report from the Institute for Sustainable Finance, which calls for economic reconciliation and increased measures to support Indigenous access to capital as necessary aspects of Canada's net-zero transition:

> As Canada strives to reach net-zero targets by 2050, it will need to consider how to obtain the social licence from Indigenous communities whose lands may be impacted by project development. This will require policy makers to create space and support for economic reconciliation through programming and services. It will require coordination across Canada, by the federal government, to develop a myriad of tools to support Indigenous communities' access to capital for them to be meaningful partners in this time of transition, to achieve a "just transition." [49]

82. In short, Dr. Cleary's cross-examination testimony on the subject of economic reconciliation affirms the need for proactive measures to support Indigenous access to capital as essential aspects of Ontario's energy future.

83. On these points, Dr. Cleary's cross-examination testimony is consistent with the positions asserted in the EETP Report, as well as the SFAC Taxonomy.

84. It is similarly consistent with the federal *United Nations Declaration on the Rights of Indigenous Peoples Act* ("**UNDRIP Act**" or "**UNDRIP**"), which these submissions address directly below.

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[47] Transcript Volume 5, page 206.
[48] Transcript Volume 6, page 18.
[49] Transcript Volume 5, pages 206-207; "Indigenous Economic Reconciliation", page 6 (TFG/Minogi Compendium for Panel 4, page 19).

*UNDRIP Affirms and Advances Economic Reconciliation for Land Use and Resource Development*

85. The UNDRIP Act exemplifies the trend of advancing legislative requirements in the area of Indigenous economic participation.

86. The EETP Report in its section entitled Current Legal Framework describes UNDRIP as establishing a universal framework of minimum standards for Indigenous peoples:

> In 2021 the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) came into force in Canada as federal legislation. Following decades of global Indigenous legal and human rights advocacy efforts, the UNDRIP was adopted by the United Nations (UN) General Assembly in September 2007 as an international instrument on the rights of Indigenous Peoples. It establishes "a universal framework of minimum standards for the survival, dignity and well-being of the Indigenous Peoples of the world."[50]

87. Canada's former justice minister responsible for the legislation has predicted UNDRIP will be as foundational for Canada as the Charter was in 1981 and 1982.[51]

88. UNDRIP includes a number of requirements that support Indigenous economic claims and development, including the affirmation of rights to own, use and develop traditional territories and resources. The key provisions are:

    (a) Article 21, which is the requirement for states to take effective measures to ensure the continuing improvement of the economic and social conditions of Indigenous peoples;

    (b) Article 23, which confirms the right of Indigenous peoples to determine and develop priorities and strategies for exercising their right to development;

    (c) Article 26, which confirms the right of Indigenous peoples to own, use and develop the lands and resources that they possess by reason of traditional ownership or other traditional occupation.

89. The most significant provision in support of Indigenous economic entitlement, however, is likely Article 32(2), which requires states to consult and cooperate in good faith in order to

[50] EETP Report, pages 34-35 (TFG Supplementary Compendium for Panel 4, page 116-117).
[51] Interview with the Hon. David Lametti. David Lametti – The Herle Burly: https://podcasts.apple.com/tr/podcast/david-lametti/id1280218816?i=1000550614270&l=tr. Relevant excerpt at approximately 34:30-35:30.

obtain the free and informed consent ("**FPIC**") of Indigenous peoples prior to the approval of any project affecting Indigenous lands or territories and other resources:

> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[52]

90. The Government of Canada has confirmed that FPIC extends beyond title lands and ensures that Indigenous rights, interests and aspirations form part of public decision-making:

> The importance of free, prior, and informed consent, as identified in the UN Declaration, extends beyond title lands. … It will ensure that Indigenous peoples and their governments have a role in public decision-making as part of Canada's constitutional framework and ensure that Indigenous rights, interests, and aspirations are recognized in decision-making.[53]

91. Canada has now adopted the UNDRIP Act, implementing UNDRIP's requirements into Canadian law. The UNDRIP Act requires the Government of Canada to take all measures necessary to ensure that the laws of Canada are consistent with UNDRIP, as adopted by the United Nations' General Assembly in 2007:

> The Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the [UNDRIP].[54]

92. These provisions collectively anticipate and promote a central role for Indigenous people in all stages of resource and economic development, further reinforcing the need to address barriers that impede that full and meaningful participation, such as access to capital.

93. Minogi and Three Fires recognize that the UNDRIP Act is federal legislation not adopted in Ontario, but submit that it remains significant to the Board's current deliberations for at least three reasons:

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[52] Declaration, Article 32(2).
[53] Department of Justice Canada's "Principles Respecting the Government of Canada's Relationship with Indigenous Peoples": https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html#:~:text=The%20importance%20of%20free%2C%20prior,Declaration%2C%20extends%20beyond%20title%20lands.
[54] Section 5.

(a) To the extent that Ontario's utilities or energy infrastructure investments are subject to federal laws, such as environmental or impact assessments, the requirements of UNDRIP will become increasingly applicable as the federal government moves to implement its requirements;

(b) UNDRIP, along with the policy documents reviewed above, reflects the trend of advancing requirements relating to economic reconciliation in Canada, as well as the reasonable expectations and entitlements of First Nations;

(c) UNDRIP's adoption in Canadian jurisdictions outside Ontario – i.e., British Columbia and federally – as well as its adoption by the UN General Assembly establish UNDRIP as available and reasonable guidance for the Board to consider.

## E. The Applicable Jurisprudence Similarly Requires the Consideration of Economic Reconciliation in the Circumstances of this Proceeding

94. The collective silence of the Four Expert Reports concerning the rights and interests of Indigenous peoples is similarly inconsistent with the current state of Canadian jurisprudence, especially cases that have been decided in many instances in the years since the Board's last cost-of-capital proceeding in 2009.

95. In particular, the applicable jurisprudence establishes that the duty to consult is triggered in relation to the economic questions at issue in this proceeding because:

(a) The duty applies to regulatory tribunals in appropriate circumstances;

(b) The duty encompasses potential claims and not just decisions evidencing an immediate impact; and

(c) The duty extends to economic interests derivative of Aboriginal rights.

96. Ontario's energy sector in the coming years faces a high likelihood of extensive development and growth, with extensive anticipated impacts on Indigenous lands and traditional territories that exceed even historic impacts. As noted above, the EETP Report (and others) have recognized:

> Most of the proposed solutions for achieving a clean energy economy rely on using Indigenous lands and resources to build clean and renewable energy infrastructure and extraction projects.[55]

97. This generic proceeding will establish the central framework for all future cost of capital decisions relating to energy projects in Ontario, producing significant implications on how development in the energy sector takes place, including with respect to projects and development implicating Indigenous lands and resources.

98. The implications of failing to address the distinct interests and circumstances of Indigenous peoples in this generic proceeding are stark. It would create an ongoing necessity for Indigenous peoples to intervene in individual proceedings and to argue for alterations to the new default framework in every subsequent process, rather than have their interests and circumstances addressed at the outset.

99. The case law reviewed below establishes that the responsibility for addressing the impacts of the Board's cost-of-capital methodologies on First Nations and Indigenous communities should not fall exclusively on Indigenous intervenors. In fact, the jurisprudence reviewed in the sections below establish a requirement to consider and address the implications for Indigenous economic interests in the context of this proceeding.

*Duty to Consult Applies to Regulatory Tribunals and Encompasses Potential Claims*

100. The duty to consult can apply to regulatory tribunals. In particular, a statutory body with delegated executive responsibility to make a decision that could adversely affect Aboriginal and treaty rights is acting on the Crown's behalf, with the attendant obligation to consult and accommodate.[56]

101. The duty will arise where a potential or recognized Aboriginal or treaty right may be negatively impacted by a decision. The Supreme Court has recognized that:

[55] EETP Report, page 25 (TFG Supplementary Compendium for Panel 4, page 107). See also LEI Cross-Examination, Transcript Volume 1, page 154.
[56] *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 ("***COTFN***"), para 31.

> A decision by a regulatory tribunal would trigger the Crown's duty to consult when the Crown has knowledge, real or constructive, of a potential or recognized Aboriginal or treaty right that may be adversely affected by the tribunal's decision.[57]

*Duty to Consult Extends Beyond Immediate Impacts and Implicates Ostensibly Neutral Policy Decisions*

102. The adverse impacts necessary to trigger a duty to consult extend beyond immediate impacts to include any effect that may prejudice an Aboriginal right. In this way, the Federal Court has confirmed that high-level policy decisions may trigger a duty to consult to the extent that they facilitate future adverse impacts:

> There is a disagreement on the third element, which is the "possibility that the Crown conduct may affect the Aboriginal claim or right" requiring the claimant show a "causal relationship". Adverse impacts extend to any effect that may prejudice an Aboriginal right. Although adverse effects are often physical in nature, the Supreme Court of Canada is clear that adverse effects may extend to high-level policy decisions or changes to resource management, which do not have an immediate impact on lands and resources. "This is because such structural changes to the resources management may set the stage for further decisions that will have a direct adverse impact on land and resources". As discussed above, a generous, purposive approach is required. (Citations omitted.)[58]

103. The Federal Court's findings are consistent with Supreme Court jurisprudence confirming that the duty to consult extends beyond matters that trigger immediate impacts:

> The duty to consult is triggered when the Crown has actual or constructive knowledge of a potential Aboriginal claim or Aboriginal or treaty rights that might be adversely affected by Crown conduct. Crown conduct which would trigger the duty is not restricted to the exercise by or on behalf of the Crown of statutory powers or of the royal prerogative, nor is it limited to decisions that have an immediate impact on lands and resources. The concern is for adverse impacts, however made, upon Aboriginal and treaty rights and, indeed, a goal of consultation is to identify, minimize and address adverse impacts where possible.[59] (Emphasis added.) (Citations omitted.)

104. Historical context can form an essential aspect of understanding the nature of a decision's impact. While the Supreme Court has noted that the duty to consult is "not the vehicle to address historical grievances", the SCC has recognized that:

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[57] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 ("***Clyde River***"), para. 29. See also *COTFN*, para 29 and 32.
[58] *Ermineskin Cree Nation v Canada (Environment and Climate Change)*, 2021 FC 758 ("***Ermineskin***"), at para 100. See also *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* 2010 SCC 43 ***("Rio Tinto***")***,*** para 34–36, 42–43, and 45–46.
[59] *Clyde River*, para 25.

> [I]t may be impossible to understand the seriousness of the impact of a project on s. 35 rights without considering the larger context.… Cumulative effects of an ongoing project, and historical context, may therefore inform the scope of the duty to consult."[60]

105. Furthermore, the Supreme Court has confirmed that the duty to consult may arise with respect to the kinds of generally applicable issues that a generic proceeding may consider. In particular, an ostensibly neutral or universal policy decision may still give rise to a duty to consult on the basis of the threats such decisions may pose to Aboriginal rights and interests. The Supreme Court has acknowledged the reasonable basis for Indigenous concerns when faced with superficial neutrality:

> Section 35(1) suggests that while regulation affecting aboriginal rights is not precluded, such regulation must be enacted according to a valid objective. Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute de facto threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation. [Emphasis added.][61]

*Duty to Consult Extends to Economic Interests*

106. In the 15 years since the Board's 2009 Decision, Canadian courts have increasingly recognized that Indigenous rights extend to economic interests.

107. The Supreme Court, for example, has confirmed that Aboriginal title gives the holder the right to use, control, and manage the land and the right to the economic benefits of the land and its resources.[62]

108. Lower court decisions have similarly affirmed the existence of the duty to consult in relation to economic interests that are derived from, or closely related to, Aboriginal and treaty rights. For example, the Federal Court in *Ermineskin* held:

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[60] *COTFN*, paras 41-42.
[61] *R. v. Sparrow,* [1990] 1 S.C.R. 1075, (1990), 70 D.L.R. (4th) 385 ("***Sparrow***"), at para 64.
[62] *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. at paras 67, 73-76, 88, 94, 121.

> Well-established jurisprudence requires a generous and purposive approach to the constitutionalized doctrine of the honour of the Crown and its corollary, the duty to consult. This flows from relevant and important objectives including reconciliation between Canada and First Nations. The jurisprudence now extends the duty to consult to include economic rights and benefits closely related to and derivative from Aboriginal rights as discussed below. Thus, rights that are closely related to and derivative from Aboriginal rights are protected by the duty to consult which of course flows from the constitutionalized doctrine of the honour of the Crown.[63] (Emphasis added.)

109. The court in *Ermeniskin* noted that economic interests have given rise to the duty to consult when the interests derive from a right, title, or underlying territorial right:

> [P]recedents where the Court have taken into account "economic interests" to establish a duty to consult have been established when these interests are closely related to and thus are derivative from an Aboriginal right or title or to an underlying territorial right…. Thus, economic interests in aspects of land claimed and the economic use of land have been acknowledged as situations that may trigger the duty to consult.[64]

110. The Federal Court's decision in *Ekuanitshit*[65] provides similar precedent for the proposition that economic interests may give rise to a duty to consult in appropriate circumstances:

> The Court agrees with the Innu of Ekuanitshit that the duty to consult may exist even when broader economic interests, not only traditional Aboriginal rights, are at stake (*Ehattesaht First Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 849 [*Ehattesaht*] at para 61). The time when Aboriginal activities consisted only in hunting, fishing, trapping and selling artisanal products has passed. Aboriginal peoples' economic reality can no longer be reduced to only those traditional activities.
>
> However, precedents where these economic interests were taken into account to establish a duty to consult were established when these interests were closely related to an Aboriginal right or title or to an underlying territorial right (*Ehattesaht*, at paras 59-62; *Da'naxda'xw/Awaetlala First Nation v British Columbia Hydro and Power Authority*, 2015 BCSC 16; *Squamish Nation v British Columbia (Community, Sport and Cultural Development)*, 2014 BCSC 991). Thus, the economic aspects of land claimed and the economic use of land have been acknowledged as a situation that may trigger the duty to consult.…[66] [Emphasis added.]

111. Ontario's energy sector is likely on the cusp of massive levels of development as part of Canada's broader efforts to decarbonize, which as noted will likely produce extensive development affecting Aboriginal rights, the rights of Indigenous Peoples, Indigenous lands and traditional territories, as well as the resources on those lands and territories.

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[63] *Ermineskin*, para 8. See also para 105.
[64] *Ermineskin*, para 109.
[65] *Council of the Innu of Ekuanitshit v. Canada (Fisheries and Oceans),* 2015 FC 1298 ("***Ekuanitshit***").
[66] *Ekuanitshit,* para 176-177.

112. The questions that this cost of capital proceeding addresses will have far-reaching influence on who participates in that development and consequently how the development takes place.

113. On the basis of the above, this proceeding gives rise to a duty to consult and accommodate, including in relation to how these proceedings may affect the economic interests of Indigenous people across Ontario.

## F. Canada's Western Provinces Have Begun to Consider Economic Reconciliation in Energy Sector Regulatory Decisions

114. The sections above underscore the importance of and legal requirement to include consideration of Indigenous economic interests as a central component to decisions that carry the potential to affect Indigenous rights, lands and resources.

115. Recent decisions from Alberta and British Columbia demonstrate that courts and regulators elsewhere in Canada have begun to respond to these priorities and requirements in the context of the energy sector.

116. These decisions provide guidance on how decision-makers have begun to incorporate economic reconciliation into questions relating to development, as well as cost-of-capital risk analyses in circumstances where reconciliation falls short of its goals.

### *Alberta Court of Appeal Endorses Indigenous Economic Interests as Part of Public Interest Analysis for Energy Sector Development*

117. Canadian courts have begun to respond to economic reconciliation in the context of decisions concerning development in the energy sector, providing an important precedent for Ontario as it engages on the issues that will define the nature of development in the coming years, including for the purposes of the energy transition.

118. The most prominent example is a recent case from the Alberta Court of Appeal,[67] where the panel confirmed that positive economic impacts for First Nations are relevant factors for the Alberta Utility Commission to consider when evaluating the public interest.

119. In *AltaLink,* the Alberta Court of Appeal reversed the initial findings of the Alberta Utilities Commission on the question of whether the Piikani Nation and the Blood Tribe could pass on recurring audit and hearing costs that they incurred as utility owners to ratepayers.[68]

120. The Alberta Utilities Commission ("**AUC**") had disallowed the costs on the basis of its "no-harm test", finding that the costs in question would not arise if AltaLink continued to operate the assets, as opposed to entering into the partnership with the Piikani Nation and the Blood Tribe that formed the basis for the broader application.[69]

121. In reversing the decision, the Alberta Court of Appeal endorsed a broader approach to the considerations relevant to the transfer and sale application, including concerning determinations of what constitutes the public interest.[70]

122. Among the considerations that the Alberta Court of Appeal referenced as supporting a finding that the application and its associated costs were in the public interest were the following:

    (a) Projects that increase the likelihood of economic activity on a reserve, which the Court of Appeal noted was consistent with the Calls to Action from the Truth and Reconciliation Commission of Canada;[71]

    (b) Improvements to Indigenous job prospects and education opportunities;[72]

    (c) "Mutual benefits" in Alberta derived from improvements to Indigenous economic activity;[73] and

[67] *AltaLink Management Ltd v Alberta (Utilities Commission),* 2021 ABCA 342 ("***AltaLink***").
[68] *AltaLink*, para 34-37.
[69] *AltaLink*, para 34-37.
[70] *AltaLink*, para 53-57.
[71] *AltaLink*, para 59 and associated footnote 78.
[72] *AltaLink*, para 60-68.
[73] *AltaLink*, para 69-71.

(d) Benefits from increased utilization of Indigenous communities as a currently untapped labour source.[74]

123. Justice Feehan concurred in the result, but he expanded on questions relating to the duty to consult and reconciliation that arose in the case. Several aspects of his findings are relevant in the circumstances of the current proceeding, since they provide guidance on how an energy regulator can consider economic reconciliation in the context of decisions affecting development on Indigenous territories.

124. First, Justice Feehan's concurring opinion emphasized that the AUC must consider reconciliation whenever it engages with Indigenous collectives when raised by the parties and relevant to the public interest:

> [T]he parties asked this Court to address the question of whether the Commission is obligated to consider the honour of the Crown and reconciliation when Indigenous collectives are involved as private partners in the energy transmission industry. Although this appeal can be resolved on the administrative law principles set out in the reasons for decision of the majority, it is important to address this question and clarify the Commission's duties to Indigenous peoples or their governance entities who appear before it.
>
> I conclude that the Commission, in exercising its statutory powers and responsibilities, must consider the honour of the Crown and reconciliation whenever the Commission engages with Indigenous collectives or their governance entities, and include in its decisions an analysis of the impact of such principles upon the orders made, when raised by the parties and relevant to the public interest.[75]

125. Second, Justice Feehan noted that the AUC's broad public interest mandate meant it must address reconciliation, including the economic interests of Indigenous peoples:

> An administrative tribunal with a broad public interest mandate, such as the Commission, must address reconciliation as a social concept of rebuilding the relationship between Indigenous peoples and the Crown by considering the concerns and interests of Indigenous collectives. This includes consideration of the interests of Indigenous peoples in participating freely in the economy and having sufficient resources to self-govern effectively.[76]

126. Third, Justice Feehan concluded that addressing reconciliation could including consideration of non-binding sources of law and policy, including UNDRIP, towards

[74] *AltaLink*, para 72.
[75] *AltaLink*, para 83-84.
[76] *AltaLink*, para 121.

ensuring an appropriately broad view of the public interest, as well as appropriate support for reconciliation in general:

> To determine how a decision could impact the imperative of reconciliation, the Commission should ensure that it is responsive to the submissions of Indigenous collectives which appear before it. It may also choose to consider non-binding sources of domestic and international law and policy, such as the *[UNDRIP Act],* which came into force in Canada on June 21, 2021 and imposes obligations on the federal government.
>
> While the Commission is not obligated to consider *UNDRIP*, it may serve as a useful tool to inform a fuller understanding of reconciliation. *UNDRIP* acknowledges the rights and freedoms of Indigenous peoples derived from their "political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources": *UNDRIP*, 3. Article 20 affirms the right of Indigenous peoples to "maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities." Article 21 states that Indigenous peoples have the right to the improvement of their economic and social conditions and that governments must ensure continuing improvement of those conditions.
>
> The Commission must not take an unreasonably narrow view of the public interest and must make efforts to foster reconciliation by taking the interests of Indigenous peoples into account in its decisions.[77] (Citations omitted.) (Emphasis added.)

127. Minogi and Three Fires acknowledge that the applicable public interest provisions from the *Alberta Utilities Commission Act* are broader than Ontario's equivalent insofar as they require consideration of the social and economic effects of proposed development.[78]

128. Nevertheless, Alberta's recognition that supporting economic reconciliation can serve the public interest is entirely consistent with Ontario's equivalent provisions, including the *Ontario Energy Board Act*'s[79] provisions:

(a) requiring consideration of the "interests of consumers with respect to prices and the reliability and quality of electricity service";[80]

(b) the Board's legislated objective to promote economic efficiency and cost effectiveness in the electricity sector;[81] and

[77] *AltaLink*, para 122-124.
[78] *Alberta Utilities Commission Act*, SA 2007, c A-37.2, Section 17.
[79] *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Sched. B.
[80] Section 96(2).
[81] Section 1(2).

(c) the Board's legislated objective to facilitate the maintenance of a financially viable gas sector.[82]

129. The EETP Report's sections underscoring the requirement for meaningful Indigenous participation as part of any successful energy future for Ontario demonstrate that Justice Feehan's approach would be equally effective in promoting the Board's goals of broader benefits in Ontario's energy sector.

## G. British Columbia Has Recognized that Failure to Advance Reconciliation Can Produce Risks to Cost of Capital

130. In addition to an increasing recognition of how reconciliation is an essential component of supporting the public interest, there is a growing recognition that a failure to advance reconciliation can lead to increased risks in the energy sector.

131. These submissions, in paragraphs 76-80 above, detail aspects of the EETP Report and Dr. Cleary's testimony that assert that a failure to facilitate Indigenous equity participation and general engagement can lead to opposition and delay, generally undermining the province's ability to seize the economic opportunities of electrification and the energy transition. [83]

132. Dr. Cleary confirmed that these types of risks, in turn, can have a detrimental impact on the cost of raising capital.[84]

133. The British Columbia Utilities Commission ("**BCUC**") in its recent generic cost of capital proceeding recognized similar risks, which it described as Indigenous Rights and Engagement Risk, as deserving of their own risk category for the purposes of a broader cost analysis.[85]

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[82] Section 2 generally.
[83] Transcript Volume 6, page 17-18; EETP Report, page 51 (TFG Supplementary Compendium for Panel 4, page 133).
[84] Transcript Volume 6, page 18.
[85] British Columbia Utilities Commission ~ Generic Cost of Capital Stage 1 ~ Decision and G-236-23, pages 40, 45-47 and 55. ("**BCUC Generic Cost of Capital Hearing**").

134. The LEI Report summarizes the BCUC's seven major risk factors,[86] describing the category for "Indigenous rights and engagement risk":

> The risk refers to the potential for utility operations to be impacted by policy or legislation regarding *Aboriginal rights and title or by Indigenous groups intervening directly in the utility regulatory process or by asserting Aboriginal rights and title.*[87] (Emphasis in original.)

135. FortisBC Energy Inc., which participated in the proceeding before the BCUC, described the risks as "an elevated risk of cost escalation, project delays, and/or projects being denied approval."[88]

136. The BCUC decision serves to underscore the downside risk to the cost of capital that a failure to adequately advance economic reconciliation can pose. These findings are consistent with the position of the EETP, set out above, calling for meaningful Indigenous participation and engagement at the earliest stages of project development.

137. By highlighting these risks to the cost of capital, the BCUC decision also serves to illustrate the relevance and importance of exploring ways to mitigate these risks by advancing economic reconciliation using the mechanisms only available in a generic cost of capital proceeding.

138. In the following sections, these submissions address specific proposals that will serve to advance economic reconciliation, as well as the Board's mandated objectives and the interests of Ontario more broadly.

## H. <u>This Proceeding Is an Opportunity to Advance Reconciliation in a Manner that Supports the Energy Sector's Broader Objectives</u>

139. The sections above have detailed how developments in jurisprudence, policy, and Ontario's energy sector itself all give rise to the requirement that the Board consider the economic interests of Indigenous people as a central part to its decision in this proceeding.

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[86] LEI Report, page 56-60.
[87] LEI Report, page 59.
[88] BCUC Generic Cost of Capital Hearing, page 46.

140. In particular, this proceeding gives rise to the question of how the determinations in this proceeding will help or hinder the ability of Indigenous people to meaningfully participate in Ontario's energy sector, including in the form of equity participation.

141. This proceeding therefore represents an opportunity to advance reconciliation in a way consistent with existing jurisprudence, as well as progress in the energy sector itself, and in a way that overcomes the significant gaps and oversights of our historical approaches.

142. The following sections will identify ways that the current approach to cost of capital significantly undermines opportunities for Indigenous investment in regulated assets during their initial construction phases.

143. Existing cost of capital policies effectively preclude First Nations investment in regulated assets until the construction period is complete. In effect, this means that many or all vital project decisions are made with a complete absence of First Nations ownership and economic participation.

144. The sections below will also demonstrate that there are two policy outcomes that would significantly mitigate these barriers to entry that First Nations face when considering equity investment. In particular:

(a) First Nations investors should be entitled to a return consistent with the cost of their equity, which is properly reflected in the WACC prescribed by the OEB. Applying the WACC to Construction Work in Progress would overcome the immediate shortfall position that the prescribed interest rate produces for most prospective First Nation investors; and

(b) The Board could also consider adopting an approach of concurrent cost recovery, at least with respect to First Nations equity investment. This approach would allow project benefits to flow immediately, concurrent with construction of a project, overcoming in part the challenges that First Nations with limited access to capital can face.

145. These submissions will now identify some of the existing barriers to increased Indigenous equity participation before addressing specific proposals to address those barriers.

*Existing Barriers to Indigenous Participation Reflect Changing Realities of Indigenous Engagement in the Energy Sector*

146. The EETP Report is clear that facilitating Indigenous participation in the energy sector can only take place on the basis of an adequate understanding of the circumstances surrounding Indigenous participation:

> To enable Indigenous participation and achieve true partnerships, it is important to understand the economics of Indigenous governments and how they differ from other forms of government in Canada.[89]

147. Dr. Cleary agreed during his cross-examination that the four experts in this proceeding failed to address this central question from the EETP Report in the context of the current proceeding.[90]

148. Given the failure of the Four Expert Reports to investigate or otherwise comment on the distinct circumstances of Indigenous peoples, it is unsurprising that they offer no recommendations specifically relating to their engagement or advancement.

149. The factual basis specific to Indigenous peoples, set out in these sections and relevant to the relief that Minogi and Three Fires seek in this proceeding, is therefore generally uncontested.

*Issue 20/21: The Board Should Adopt a Weighted Average Cost of Capital to CWIP Balances*

150. Most First Nations must borrow funds in order to invest in large utility projects.[91]

151. For First Nations, the "prescribed interest" rate can serve on its own as a complete bar to equity participation during the construction phase. That is because the cost of those funds for First Nations is often higher than the "prescribed interest" rate. Borrowing in these circumstances puts First Nations in an immediate shortfall position, since the prescribed rate will not match their cost of funds for as long as the construction period lasts.

[89] EETP Report, page 37 (TFG Supplementary Compendium for Panel 4, page 119). See also Transcript Volume 6, page 16.
[90] Transcript Volume 6, page 16.
[91] Transcript Volume 1, page 166.

152. This shortfall position can extend for the duration of what are often multi-year construction projects.

153. Concentric in its report (the "**Concentric Report**") identifies the shortfall problem that First Nations often face, although Concentric describes the issue in a general sense:

> In terms of CWIP, Concentric finds that the current approach that applies the long-term cost of debt to CWIP balances has the potential to significantly understate the cost of capital for utilities during the construction phase of projects."[92]

154. For First Nations, who generally do not have access to the pools of capital that utilities often do, this mismatch can serve as a complete barrier due to the lack of available funds. This remains true even if the First Nation is willing to forego earning the full equity rate of return on their investment, which Minogi and Three Fires submit they should not be required to do.

155. Concentric agreed on cross-examination that the shortfall problem that they identify in their report could produce especially negative outcomes for First Nations to the extent they are required to borrow at higher rates in order to participate in a project:

> Mr. Daube: Assuming First Nations that are interested in participating as equity partners in infrastructure projects in Ontario must borrow at a cost that is higher than other potential investors, would that not mean that the problem you're describing is worse for the investors who are forced to borrow at that higher rate?
>
> Mr. Dane: Yes, and assuming that that higher rate is higher than the current deemed cost of debt on CWIP.
>
> Mr. Daube: And in this scenario, against I know you don't have firsthand knowledge, but in this hypothetical, conceivably that shortfall position could present a barrier to investment on the part of those individuals and groups; is that fair to say?
>
> Mr. Dane: Yes.[93]

156. Concentric also confirmed that adopting their recommended approach to CWIP balances, which would entail replacing the "prescribed interest" rate with a WACC, could mitigate this barrier for First Nations investors:

> Mr. Dane: I would say it this way: Our view is that the approach of applying a weighted average cost of capital would reflect the actual cost of constructing these projects. And so,

[92] Concentric Report, page 153; Transcript Volume 2, pages 114-115.
[93] Transcript Volume 2, pages 116.

> to your question, it would have a further effect of mitigating the problem that you described.[94]
>
> Mr. Goulding confirmed that such an approach based on WACC is not necessarily inconsistent with the fair return standard:
>
> Mr. Daube: [T]here's nothing on its face about an approach based on WACC that, on its face to you, is at odds with the fair return standard?
>
> Mr. Goulding: I would agree with that. I would agree with that. I have the slight issue in terms of the length of the project, you know, the one year versus the longer. But I would agree with you in general, particularly for longer projects, there's nothing on its face that says applying the weighted average cost of capital would violate the fair return standard.
>
> …
>
> Mr. Daube: You'll agree that … whether or not WACC is the reasonable approach is going to depend on two things, details of implementation and the considerations that the decision maker in play is trying to prioritize; is that fair?
>
> Mr. Goulding: Yes, I think that's fair.[95]

157. Mr. Goulding furthermore conceded that this issue was one where he felt less strongly than certain other recommendations from the LEI Report, despite his written recommendation to maintain the current deemed cost of debt on CWIP:

> Mr. Goulding: … I think this is one area where, you know, you go through a set of recommendations and you say, well, okay, we come to these conclusions. But in this list of, you know, more than 20 recommendations, there's certainly some where we feel stronger than others, right. In this particular case, I would say that, you know, the WACC approach, particularly for projects of more than one year, meets the FRS and may better accommodate other policy considerations.[96]

158. On the basis of the above, Minogi and Three Fires request that the Board's decision include the adoption of Concentric's recommendation to apply a WACC applicable to CWIP balances for large, multi-year[97] projects and investments.

159. This measure on its own, by mitigating the immediate shortfall position that many First Nations face, would be likely to increase Indigenous equity participation during the construction phase of projects, when First Nations involvement matters most in terms of the ability to influence project direction and maximize Indigenous participation.

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[94] Transcript Volume 2, pages 116-117.
[95] Transcript Volume 1, pages 162-163.
[96] Transcript Volume 1, page 164.
[97] I.e., greater than one year.

*Issue 20/21: The Board Should Allow Indigenous Equity Participants to Make Use of Concurrent Cost Recovery for CWIP*

160. The initial shortfall problem described above is exacerbated by a second problem that First Nations face with the current policy related to the timing of access to returns.

161. Ontario's current approach to allowance for funds used during construction ("**AFUDC**") provides that investors do not receive payment during the construction phase and must wait until a new facility is in-service before they can receive payment.

162. Concentric describes this approach in its report as follows:

> In Ontario, all entities, including single-asset developers, incur costs over the course of development, without an equity return or cash flow until approved into Ontario's uniform transmission rates.[98]

163. First Nations without large pools of available capital are disadvantaged by the AFUDC approach. That is because First Nations are often unable to carry the cost of investment capital until a new facility is in-service, which is when they are currently entitled to begin receiving payment.

164. Concentric agreed in its cross-examination that carrying these costs can represent an obstacle to investment for investors that have more limited access to funds:

> Mr. Daube: Do you accept that carrying those costs can represent an obstacle to investment specifically for First Nations? And, by that, I mean to the extent that the potential investors in question may or may not have more limited access to necessary funds to participate in infrastructure projects/
>
> Mr. Dane: I would accept that. I would generalize it a bit, as Mr. Coyne did, to say that, for any investor that couldn't' bear that cost, that would be true.[99]

165. Concentric also confirmed that concurrent cost recovery ("**CCR**") is a mechanism that could help to overcome this problem:

> Mr. Daube: If lack of funds is a problem and you're not getting the funds until the in-service date, what I really want to know is whether you agree that, whatever countervailing

[98] Concentric Report, page 139. Concentric confirmed on cross-examination that these costs include construction costs. Transcript Volume 2, page 113.
[99] Transcript Volume 2, page 113.

> considerations may apply, an approach that employed concurrent cost recovery could potentially mitigate some of the problem that we are describing.
>
> Mr. Dane: Yes, I think generally, and what you're describing we would call CWIP in rate base or [concurrent] recovery of costs. I think that's an incentive to incentivize investment, and part of the consideration there is the real-time recovery of the cost of construction.[100]

166. An approach that made CCR available in defined circumstances would be consistent with approaches that the OEB has previously endorsed. More specifically, the Board's 2010 report, *The Regulatory Treatment of Infrastructure Investment in connection with the Rate-regulated Activities of Distributors and Transmitters in Ontario*[101] ("**2010 Investment Report**"), anticipated the availability of accelerated cost recovery mechanisms applicable to CWIP and pre-commercial expenses.

167. The 2010 Investment Report took place at a time similar to current circumstances, when Ontario anticipated significant infrastructure spending, especially among electricity utilities,[102] giving rise to a recognized need for flexible approaches:

> The Board acknowledges that, with the advent of the *Green Energy and Green Economy Act, 2009* (the "Green Energy Act"), **it is anticipated that electricity distributors and transmitters will undertake significant new infrastructure investment**, particularly to accommodate new renewable generation. Accordingly, **the Board recognizes the need for a regulatory framework that provides further flexibility which utilities may need, in appropriate circumstances, to make these infrastructure investments**.
>
> **Alternative mechanisms should be available in appropriate cases** in relation to investments driven by the Green Energy Act **and potentially in appropriate circumstances in relation to other types of investments**.[103] (Emphasis added)

168. The Board's openness to these flexible mechanisms reflected broader efforts at the time to facilitate new infrastructure investment while maintaining protections for ratepayers:

> On April 3, 2009, the Chair of the Ontario Energy Board issued a Statement confirming the Board's commitment to creating conditions that will foster timely and appropriate investment in electricity distribution and transmission infrastructure while ensuring that the interests of ratepayers continue to be protected. On June 1, 2009, in a second Statement the Chair advised of the development of three initiatives, one of which is to consider more innovative approaches to cost recovery, primarily in relation to infrastructure investments relating to the accommodation of renewable generation and smart grid development but

[100] Transcript Volume 2, page 114.
[101] EB-2009-0152 ("***2010 Investment Report***").
[102] 2010 Investment Report, page 2.
[103] 2010 Investment Report, page i and ii.

> potentially also applicable in relation to other types of projects in appropriate circumstances.[104]

169. The Board noted that allowing for the accelerated recovery of CWIP offered benefits, including among other things positive effects for utility cash flow, the financial health of a company, and the ability to attract capital:

> The long lead times required to plan and construct new facilities can affect utility cash flow, in turn affecting the overall financial health of a company and its ability to attract capital on reasonable terms. As noted in the Discussion Paper, many U.S. states have passed legislation and/or put in place regulations to allow for full or partial CWIP to be placed in rate base during the construction of certain facilities. Including CWIP in rate base provides two principal benefits. First, it provides a smoothing, or phased-in, effect on rates and thereby mitigates the rate impact that might otherwise take place when large new plant (sic) is placed into service. Second, it can reduce borrowing costs. Permitting a utility to recover CWIP funding can also reduce a project's total net present value cost, although it can raise intergenerational inequity issues.[105] (Emphasis added.)

170. The Board therefore indicated that it would consider applications to include up to the full amount of CWIP costs in the rate base:

> The Board will allow utilities to apply to include up to 100 percent of prudently incurred CWIP costs in rate base. This approach allows utilities to recover the interest costs on debt and a return on equity (i.e., the weighted cost of capital) during the construction period. The depreciation or return of the investment will continue to be recovered once the project goes into service. The Board may also consider: a) applying a cap on the CWIP amount allowed or b) allowing the CWIP amount into rate base on a staged basis as construction proceeds. The Board will also allow utilities to apply to expense prudently incurred pre-commercial costs.[106] (Emphasis added.)

171. The Board anticipated that the accelerated recovery of CWIP was most likely to apply in cases of capital-intensive, multi-year projects:

> The Board agrees with the comments made in the Discussion Paper that this alternative mechanism is likely to be most suitable in relation to the construction of capital intensive multi-year projects. This mechanism will provide greater up-front regulatory predictability, rate stability and improved cash flow for utilities.[107]

172. While the Board's focus was on Green Energy Act-related investments, it repeatedly stated that these alternative mechanisms would potentially be made available to other types of investments:

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[104] 2010 Investment Report, page 2.
[105] 2010 Investment Report, pages 14-15.
[106] 2010 Investment Report, pages 15 and ii.
[107] 2010 Investment Report, page 15.

> Alternative mechanisms should be available in appropriate cases in relation to investments driven by the Green Energy Act and potentially in appropriate circumstances in relation to other types of investments.[108]

173. The Board considered its approach to alternative mechanisms including CWIP as generally consistent with existing principles of utility regulation:

> The Board's approach to alternative mechanisms should not be viewed, as one stakeholder commented, as a significant departure from many of the well-established and fundamental principles of utility regulation. Utilities will still be expected to demonstrate that the investment is needed, that it is prudent, and that it is economically feasible. Rate impacts will also be assessed. Further, the need to ensure that shareholder risk and reward are properly matched will continue to guide the Board's approach to rate-making.[109]

174. The Board's position in this regard was consistent with its position that alternative mechanisms would be of limited application:

> The Board emphasizes that alternative mechanisms will not be granted as a matter of course for all such investments. An applicant must demonstrate that there is a requisite relationship between the alternative mechanism proposed and the investment project, in the sense that the proposal is tailored to address the demonstrable risks and challenges faced by the applicant.[110]

175. Many Indigenous investors would satisfy both the letter and the spirit of the criteria that the Board set out in the above passage. The mechanism of CCR could be made available in circumstances where an Indigenous applicant can demonstrate that their risks and challenges include an inability or challenges to carry the investment cost of a project through the construction period without the ability to recover CWIP on an accelerated basis in the interim.

176. On the basis of the above, Minogi and Three Fires request that the Board confirm:

(a) the availability of CCR for large, multi-year[111] projects and investments, subject to application to the Board in the specific circumstances of the case; and

(b) that CCR will be made available in circumstances where doing so will mitigate obstacles to investment involving cost for an Indigenous applicant.

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[108] 2010 Investment Report, page ii. See also pages i, ii, 2, 14, 19,
[109] 2010 Investment Report, page 14.
[110] 2010 Investment Report, page 14.
[111] I.e., greater than one year.

*Issue 13: The Board Should Provide a Risk Premium for Single-Asset Transmitters in Cases of Indigenous Equity Participation that Satisfies a Reasonable Materiality Threshold*

177. The Board's determinations concerning the capital structure for single-asset electricity transmitters will have a significant impact for Indigenous equity participants in Ontario's energy sector, since many First Nations invest mainly or exclusively in single-asset entities.

178. The recognition of the significant impact that this issue will have for Indigenous investors is missing from the Four Expert Reports, given their failure to examine or otherwise address Indigenous interests and issues in general. In particular, the Four Expert Reports do not explore how current policies relating to single versus multi-asset capital structure affect Indigenous interests or equity participation in such projects.[112]

179. Therefore, while LEI recommends that the current approach of allowing the same equity thickness to all electricity transmitters and distributors be maintained,[113] they acknowledge not having considered Indigenous interests or implications.[114]

180. The primary source of evidence in this proceeding on how equity thickness for single-asset transmitters will affect Indigenous equity participation comes from the cross-examinations of LEI and Concentric.

181. During those cross-examinations, Mr. Goulding on behalf of LEI conceded a number of points that underscore that the Board's decision on this issue will carry disproportionate impacts for Indigenous equity participation. Specifically, he confirmed that many single-asset transmitters have been designed in part to facilitate Indigenous equity participation, that many already have some degree of Indigenous equity participation, and that such companies have the potential to further increase Indigenous equity participation:

> Mr. Daube: Let's talk specifically about Indigenous participation in this space. Do you agree that many, if not most, of single-asset electricity transmission companies in Ontario have been designed in part to facilitate Indigenous equity participation?

[112] See the Four Expert Reports, which include no such discussion. See also Transcript Volume 1, pages 154; Transcript Volume 2, page 106; N-M2-1-TFG/Minogi-5, Response A.
[113] LEI Report, page 144; Transcript Volume 1, pages 155.
[114] Transcript Volume 1, pages 147-148 and 154.

> Mr. Goulding: Yes.
>
> Mr. Daube: Do you agree that may single-asset electricity transmission companies in Ontario already have some degree of Indigenous equity participation?
>
> Mr. Goulding: Yes.
>
> Mr. Daube: Is it fair to say that single-asset electricity transmission companies have the potential to increase Indigenous equity participation in Ontario's energy sector?
>
> Mr. Goulding: Yes.[115]

182. Mr. Goulding also acknowledged that these factors combine to produce a context in 2024 that is different from the context in 2006 when the OEB's thinking on sized-based capital structure was published, in that there is now far more Indigenous equity participation in Ontario's single-asset transmitters:

> Mr. Daube: When we are comparing life in 2024 to life in 2006, given the various points of agreement we had on the state of Indigenous equity participation in these projects, would you agree that there is far more Indigenous equity participation in single-asset electricity transmission companies in 2024 than there was in 2006?
>
> Mr. Goulding: Yes.
>
> Mr. Daube: You'll also agree that Ontario's energy sector is far more accepting and supportive of the goals of reconciliation than it was in 2006?
>
> Mr. Goulding: Yes.[116]

183. Mr. Goulding's evidence on these points is consistent with the EETP Report, which noted the following:[117]

(a) Over the last two decades, the number of medium and large hydro, wind, solar and bioenergy electricity generating projects (projects generating one megawatt or more of electricity) with Indigenous participation has grown substantially in Canada;

(b) In Ontario, there are over 450 renewable energy projects that are owned by or partnered with Indigenous communities;

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[115] Transcript Volume 1, page 158. Mr. Coyne on behalf of Concentric similarly agrees that at least some single-asset electricity transmission companies in Ontario have been designed in part to facilitate Indigenous equity participation (and similarly have some degree of Indigenous equity participation), but he was unable to confirm the specific number of whether it was a majority. See Transcript Volume 2, page 111.
[116] Transcript Volume 1, pages 159-160.
[117] EETP Report, page 41 (TFG Supplementary Compendium for Panel 4, page 123).

(c) It is estimated that since 2017, the number of medium and large Indigenous clean energy projects across the country has grown by 29.6 per cent, including hydro, wind, solar, bioenergy and hybrid energy sources;

(d) Since 2015, Canada has seen a significant rise in in Indigenous participation in electricity transmission projects.

184. The two cross-examinations also served to demonstrate that investment in single-asset transmitters can create a concentration risk for First Nations that typical utilities, which are able to diversify risk across multiple projects, do not face.

185. Mr. Goulding confirmed that diversification can reduce risk overall, insofar as diversification means a variety of cash flows with differences in volatility in the patterns of such cash flows, as well as the risks those cash flows face.[118]

186. Absent that ability to diversify, both Mr. Goulding and Mr. Coyne agreed that single-asset companies as a general premise do not have the same benefits of ongoing cash flows from other operations that multi-asset companies often do.[119]

187. This lack of an ability to diversify and thereby reduce risk in the context of equity participation in single-asset transmitters is precisely the challenge that many First Nations face.

188. Mr. Coyne's cross-examination confirmed that this risk can be especially acute for investors with less access to capital and therefore less ability to absorb a risk that materializes, which is the case with many First Nations. He also confirmed that this reality can serve as a disincentive to investment:

> Mr. Daube: Would you agree that to the extent a single-asset company has a higher risk profile, an investor with less access to capital is potentially less equipped to absorb the risk if that risk materializes?
>
> Mr. Coyne: Yes.

[118] Transcript Volume 1, pages 156.
[119] Concentric Report, page 138-139; Transcript Volume 2, page 109; See also Transcript Volume 1, pages 155-156. Mr. Goulding and Mr. Coyne differ on the question of whether this necessarily means a reduction in risk for the company in question, which Mr. Goulding believes is a separate issue.

> Mr. Daube: Do you agree that the combination – assuming it exists in this hypothetical, that the combination of higher risk plus less ability to absorb the risk if it materializes can act as a disincentive or even a bar to investment on the part of that investor?
>
> Mr. Coyne: Yes.
>
> Mr. Daube: So if First Nations or some First Nations or many First Nations fit that definition in the scenario I just described, you accept that they may face a disincentive or even a bar to investing. Is that correct?
>
> Mr. Coyne: I think that's a reasonable premise based on the assumptions you have laid out.[120]

189. In sum, the additional risks that single-asset transmitters face are especially acute for First Nations investors, who often do not have the ability to absorb or diversify using other mechanisms that a typical utility often does. This leaves Indigenous investors disproportionately exposed, given their increasing representation among investors in single-asset transmitters.

190. The existing approach therefore can serve as a disincentive to Indigenous investment, working at cross-purposes with the objectives motivating the creation of single-asset transmitters, which are often designed to facilitate Indigenous equity participation.

191. Accordingly, Minogi and Three Fires request that the Board allocate a risk premium to the equity ratio otherwise applicable to single-asset transmitters in cases of Indigenous equity participation that satisfies a reasonable materiality threshold.

192. Minogi and Three Fires agree with the recommendation of Concentric that precise differentials could be proposed and supported in the context of utility-specific rates applications.[121]

## I. Conclusions and Requested Relief

193. Ontario's energy sector has begun to demonstrate an improved commitment to Indigenous economic reconciliation, but much more needs to be done.

194. In the context of this proceeding, First Nations' access to capital is not a peripheral issue, but one that fundamentally influences the viability and cost-effectiveness of First Nations'

[120] Transcript Volume 2, page 110.
[121] Concentric Report, page 138-140.

ability to pursue equity participation in energy projects. Addressing these issues either partially or in isolation would fail to recognize the inseparable link between capital accessibility and overall energy participation.

195. Furthermore, a failure to respond to First Nations' interests within the OEB's cost of capital policy framework would create an undue burden on First Nations, who will be delayed in recognition and forced to intervene in a greater number of future proceedings in order to argue against an established default position. First Nations would need to continually expend limited resources asserting their concerns, when the Board has the mandate and ability to address them in this proceeding. This stands in stark contrast to groups that have the opportunity to be heard, and have their interests and concerns incorporated into the OEB's guiding frameworks at earlier stages, whether historically or as part of the current proceeding.

196. The early and meaningful inclusion and recognition that Minogi and Three Fires seek is consistent not only with reconciliation and the applicable jurisprudence, but also with the OEB's own express statements recognizing the importance of supporting reconciliation efforts. The Board's public statement celebrating National Indigenous History Month provides that:

> The OEB is committed to heeding the call of action for reconciliation and doing the work necessary to create a more inclusive, respectful, and sustainable energy sector.
>
> Ontario's ability to successfully navigate the energy transition requires building meaningful, long-term and collaborative partnerships with Indigenous communities and entities, and ensuring that Indigenous perspectives are included at the earliest opportunities.[122]

197. This proceeding represents an opportunity to advance reconciliation in a way that: (i) is consistent with the existing and developing jurisprudence, (ii) advances industry practice, and (iii) overcomes the significant gaps and oversights of historical approaches that are not consistent with the constitutional rights afforded to Indigenous Peoples.

[122] Ontario Energy Board's statement celebrating National Indigenous History Month. Located at https://www.linkedin.com/posts/ontario-energy-board_nihm2024-partnerships-sustainability-activity-7209935410313986048-DWvp.

198. This proceeding also presents an opportunity to advance reconciliation in a way that is consistent with Ontario's broader goals for its energy sector. In fact, as the EETP Report emphasized, advancing economic reconciliation is essential if Ontario is to navigate its energy future and the energy transition successfully.

199. While Minogi and Three Fires emphasize that its requested relief is a meaningful step towards advancing reconciliation in relation to the cost of capital questions addressed in this proceeding, they respectfully submit that the following three forms of relief are essential to reduce barriers that Indigenous investors face, increase Indigenous equity participation, and produce a successful energy future for Ontario:

(a) *Issue 13*: Minogi and Three Fires request that the Board provide a risk premium for single-asset transmitters in cases of Indigenous equity participation that satisfies a reasonable materiality threshold, reflecting the fact that questions relating to the capital structure for single-asset transmitters carry significant impacts for Indigenous investors, reflecting the higher levels of risk involved.

(b) *Issue 20/21*: Minogi and Three Fires request that the Board adopt a WACC applicable to CWIP balances for large, multi-year[123] projects and investments, that better reflects the full participation costs for investors, particularly Indigenous investors who typically do not have access to large pools of capital and must borrow necessary funds.

(c) *Issue 20/21*: Minogi and Three Fires also request that the Board confirm:

(i) the availability of CCR in large, multi-year[124] projects, subject to application to the Board in the specific circumstances of the case; and

(ii) that CCR will be made available in circumstances where doing so will mitigate obstacles to investment involving cost for an Indigenous applicant.

[123] I.e., greater than one year.
[124] I.e., greater than one year.

ALL OF WHICH IS RESPECTFULLY
SUBMITTED THIS 7th day of November, 2024

*Nicholas Daube*

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